Supreme Court, U.S.
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No.

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1994

THADDEUS PUDLO,

Petitioner,

vs.

CITY OF CHICAGO,
A Municipal Corporation,

Respondent.

Petition for Writ of Certiorari to the
Appellate Court of Illinois,
First District, Third Division

PETITION FOR WRIT OF CERTIORARI

DENNIS DOHERTY
Of Counsel

FREDERICK F. COHN
Attorney for Petitioner

205 West Wacker Drive
Suite 1515
Chicago, IL 60606

312/580-0935

312/641-0692

65 pp

(1a) QUESTIONS PRESENTED

1. (A) Does Due Process require that state reviewing courts waive strict compliance with procedural rules in order to do substantial justice?

(B) Is Due Process violated by the Illinois Appellate Court's dismissal of petitioner's appeal on jurisdictional grounds, where notice of appeal (the only jurisdictional step) was timely, and petitioner complied with all applicable requirements after he finally received notice of the order dismissing the appeal for want of prosecution?

2. Must appeals in ordinance violation cases that subject the defendant to the possibility of imprisonment, be governed by principles of fundamental fairness and due process applicable to criminal matters?

(1b) PARTIES INVOLVED (per Rule 21.1(b)]

Petitioner, Thaddeus Pudlo, was the defendant in the Circuit Court of Cook County, Illinois, appellant in the Appellate Court of Illinois, First Judicial District, Third Division, and petitioner in the Supreme Court of Illinois.

Respondent, City of Chicago, Illinois, was the plaintiff in the Circuit Court, appellee in the Appellate Court of Illinois, and respondent in the Supreme Court of Illinois.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1994

THADDEUS PUDLO,

Petitioner,

vs.

CITY OF CHICAGO,
A Municipal Corporation,

Respondent.

Petition for Writ of Certiorari to the Appellate Court of Illinois, First District, Third Division

Petitioner, Thaddeus Pudlo, (hereafter, defendant), prays that a Writ of Certiorari issue to review the judgment of the Appellate Court of Illinois, First District, Third Division, dismissing his appeal from a judgment of the Circuit Court of Cook County finding him guilty of multiple ordinance violations and imposing fines

under the Municipal Code of Chicago [hereafter, "Code"].

Defendant was found guilty of 113 separate Code violations (C. 379[1]) and fined a total exceeding 4.3 million dollars. (C. 379-405)

Judgment and Opinion Below

The Opinion of the Appellate Court of Illinois, First District, Third Division, dismissing the appeal, is set out as App. A. The Opinion is reported at 271 Ill.App.3d 107, 648 N.E.2d 679.

Jurisdictional Statement

On February 15, 1995, the Appellate Court of Illinois, First District, Third Division, filed its Opinion (App. A; App. 1) dismissing the appeal. No

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[1] Here and hereafter: "C." refers to the Common-Law Record.

Petition for Rehearing was filed. Petition for Leave to Appeal to the Supreme Court of Illinois, No. 78682, was denied on June 1, 1995. (App. B; App. 11)

This Petition for Certiorari is timely filed within 90 days thereafter.

Jurisdiction is invoked under 28 U.S.C. § 1257(a) and Rules 10.1, 12.1, and 13.1 of this Court.

Constitutional Provisions

The 4th Amendment to the U.S. Constitution provides.

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures,shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

The 5th Amendment to the U.S. Constitution provides, in part:

> "nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb . . ."

The 6th Amendment to the U.S. Constitution provides, in part:

> "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him; . . . and to have the Assistance of Counsel for his defence."

The 14th Amendment to the United States Constitution provides, in pertinent part:

> "Section 1. . . . No State shall . . . deprive any person of life, liberty, or property, without due process of law; . . ."

STATEMENT OF THE CASE

Petitioner, Thaddeus Pudlo [hereafter, defendant] was convicted of 113 Code violations[2] relative to his maintenance of real [business] property, and fined in excess of 4.3 million dollars. (C. 379-405) The Appellate Court (App. A) dismissed the appeal on jurisdictional grounds.

Had the Appellate Court reached the merits, the issues to be decided (as presented in Defendant's Brief) were:

> (1) The cause below was voluntarily dismissed by the plaintiff, and never reinstated thereafter. Accordingly, the court was without jurisdiction to enter its "final judgment," and the judgment below should therefore be reversed. (Def. Br. p. 6)

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[2] That is, Municipal Code of Chicago. A detailed list of all 113 violations was attached to Defendant's Brief in the Appellate Court [hereafter, Def. Br.] as Appendix G, pp. 1-7.

(2) Defendant was punished and sanctioned unconstitutionally for the mere assertion of his rights under the 4th Amendment to the U.S. Constitution and Article 1, section 6 of the Illinois Constitution of 1970. (Id. at 10)

(3) Assuming, *arguendo*, defendant had no constitutional right to refuse to consent to a search of his premises, the court abused its discretion in imposing sanctions which were unduly excessive and severe. [The sanctions included, that defendant was barred, not only from litigating a 4th Amendment-based Motion to Suppress, but also, from defending himself in any fashion.] (Id. at 15)

Among the ordinances for violation of which defendant was prosecuted, some provide for punishment greater than a fine - to which greater punishment(s) defendant was in jeopardy of being subjected in the underlying proceedings. To wit: The following section, under which defendant was prosecuted and convicted, provides for a fine, and/or public service, and/or up to 30 days in

jail: 7-28-040. The following section, under which defendant was prosecuted and convicted, provides for a fine, and/or public service, and/or up to 10 days in jail: 7-28-060. The following sections, under which defendant was prosecuted and convicted, provide for fines, and/or terms of public service: 4-344-610; 5-4-080; 5-4-090; 7-28-240; 7-28-450(a); 7-28-450(b); 7-28-040; 13-196-580(d); 13-196-620(a); 13-196-630(b); and 15-4-970.

Defendant refused to consent to a search of his premises under Ill.Sup.Ct. R. 217, and was sanctioned under Ill. Sup.Ct.R. 219. (C. 321-27; C. 379-405) Among the sanctions were that defendant was barred, not only from litigating a Fourth Amendment-based Motion to Suppress, but also, from defending

himself in any fashion.

Timely notice of appeal was filed on December 15, 1992, from the final judgment of the Circuit Court entered on November 17, 1992; the record was duly filed; and, when defendant sought to file a motion for leave to file his docketing statement instanter, he first discovered that the appeal had been dismissed (DWP) on the Appellate Court's own motion by order entered September 30, 1993. Defendant moved to vacate the dismissal and reinstate the appeal on December 2, 1993, which motion was **granted** by the Appellate Court on December 16, 1993. (See App. 2-3.)

Moreover, when the City (Appellee) moved for an order vacating the order reinstating the appeal, the Appellate

Court on February 18, 1994, denied the motion, thus reaffirming its order reinstating the appeal. In defendant's pleadings resisting the re-dismissal of the appeal, he reasserted via affidavit that he had no timely knowledge or notice of the DWP, that he moved to vacate the DWP within 21 days of receiving notice thereof, and further, the additional, compelling fact that counsel was seeking mandamus to compel the court reporter to furnish paid-for transcripts. (See fn. 4, p. 11, infra.)

After defendant timely filed his notice of appeal, the appeal was dismissed for want of prosecution; no Petition for Rehearing was filed within 21 days thereof as per Ill.Sup.Ct.Rule 367(a), for appellant received no

notification of the said dismissal[3]; and, diligently upon discovering that the appeal had thus been dismissed, and within 21 days of actual notice, albeit not within 21 days of entry of the dismissal order, appellant successfully moved to vacate the dismissal, and thereafter, successfully opposed Appellee's Motion to reinstate the order of dismissal, setting out compelling reasons which [initially] convinced the Appellate Court to vacate the dismissal order, reinstate the appeal

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[3] These facts - see fn. 4, p. 11, infra - are averred in pleadings on file in the Appellate Court, via Affidavit of appellate counsel Dennis Doherty [of counsel in this Petition] in support of defendant's Motion for Leave to File Appellant's Response to Appellee's Motion to Reinstate Order Dismissing This Appeal and Objection to Appellant's Motion for Extension of Time.

and accept for filing, Briefs of both parties on the merits.[4] Accordingly,

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[4] In his verified Motion for Leave to file Response, defendant averred: that he was never given notice of the September 30, 1993 order dismissing the appeal for want of prosecution; that no notice of that order was ever sent to him; that he first learned of the DWP order when filing motion for leave to file docketing statement instanter; that counsel for appellee telephoned his counsel and informed him of the DWP order; and that he filed his motion to vacate DWP order and reinstate appeal, within 21 days of receiving notice of said order.

When Appellee sought to have the Appellate Court reinstate its prior order of dismissal, which by then had been vacated, the Record on Appeal and the docketing statement had been filed.

Defendant's reason for seeking an extension, and for failure to have timely filed his Brief before the DWP order was entered, was difficulty in obtaining transcripts from the official court reporter, against whom he sought Mandamus relief, both from the Appellate Court (within the aforesaid Motion for Leave to File Response), and also via independent proceedings, Dennis Doherty v. Monica Lewis, et al., in the Circuit Court of Cook County, Illinois, No. 94 CH 1926.

the parties proceeded to file their Briefs on the merits. (See pp. 5-6, supra, setting out issues raised.)

Nonetheless, the Appellate Court in its Opinion declined to reach the merits, and instead, ruled it had no jurisdiction to proceed with the appeal, and, accordingly, dismissed the appeal. (App. 10; 648 N.E.2d at 137)

RAISING THE FEDERAL QUESTION BELOW

In the Circuit Court, defendant refused to consent to a search of the subject premises, that is, refused to permit inspections of his property sought by the City pursuant to statutory discovery procedures, Ill.Sup.Ct.R. 214, Ill.Rev.Stat. ch. 110A, sec. 214, relying on and invoking his federally guaranteed constitutional rights under

the 4th Amendment and to due process.

In the Appellate Court of Illinois, defendant argued that he was unconstitutionally and unconscionably punished, penalized and sanctioned for mere assertion of a constitutional right. (Def. Br. Point 2, pp. 10-14)

In the Supreme Court of Illinois, defendant argued that the Appellate Court's order dismissing the appeal violated his rights to due process of law (notice; right to be heard); that due process and fundamental fairness required that the merits of the appeal be reached; and that due process required that the appeal be treated as per due process principles applicable to criminal appeals, not civil appeals, due to the penal nature of the

ordinances. (Defendant's Petition for Leave to Appeal, pp. 4, 14, 15-20)

REASONS FOR GRANTING CERTIORARI

This Court should examine how Illinois has violated defendant's due process rights by dismissing his appeal in this case - where due process has been subjugated to formalistic application of a State procedural rule.

1. Due process is violated by the Illinois Appellate Court's dismissal of petitioner's appeal on jurisdictional grounds, where notice of appeal (the only jurisdictional step) was timely, and defendant complied with all applicable requirements after he finally received notice of the order dismissing the appeal.

2. Appeals in ordinance violation cases that subject the defendant to the possibility of imprisonment, must be governed by principles of fundamental fairness and due process applicable to criminal, not civil, matters.

The Illinois Appellate Court, in a formalistic application of Illinois Supreme Court Rule 367, has obliterated defendant's right to appeal and violated

his 14th Amendment due process right to fundamental fairness.

Considering itself bound to follow Woodson v. Chicago Bd. of Educ., 154 Ill.2d 391, 609 N.E.2d 318 (1993), applying Rule 367,[5] the Appellate Court itself was troubled by dismissing the appeal, stating:

> "[T]his court must accept, reluctantly, Woodson's unequivocal and controlling language.
>
> Our hesitancy is due to our recognition of future controversies where such a formalistic application of Rule 367 might lead to dismissals contrary to principles of fairness and the interests of justice." (App.

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[5] "Supreme Court Rule 367(a) requires that a petition for rehearing 'be filed within 21 days after the filing of the judgment, unless on motion the time is shortened or enlarged by the court or a judge thereof.' 134 Ill.2d R. 367(a)." App. 5-6; 648 N.E.2d at 137.

9; 648 N.E.2d at 137)

But, contrary to the Appellate Court's position that in the instant case, the dismissal was **not** contrary to principles of fairness and the interests of justice, this is **precisely** such a case where that is the result. In **this** case, **when the Appellate Court granted defendant's motion to vacate the DWP** [dismissal for want of prosecution] order, **thus reinstating the appeal, it was for good cause shown**. Defense counsel averred - and there was no contradiction by the City, nor any hint of bad faith or that the averments were not accurate - that appellant had no notice of the DWP order when it was entered; that he filed his Motion to Vacate the DWP order within 21 days of

notice (knowledge) thereof; and further, demonstrated continuing diligence in the pursuit of his appeal, in the face of a recalcitrant, paid-in-advance court reporter against whom counsel had to institute mandamus proceedings. (See fn. 4, p. 11, supra.)

DUE PROCESS REQUIRES THAT STATE REVIEWING COURTS WAIVE STRICT COMPLIANCE WITH PROCEDURAL RULES IN ORDER TO DO SUBSTANTIAL JUSTICE

This Court has consistently held that State procedural rules cannot be applied to deprive criminal defendants of fundamental, federally guaranteed constitutional rights. Specifically, in the loss-of-appeal context, in Evitts v. Lucey, 469 U.S. 387, 83 L.Ed.2d 821 (1985), this Court unequivocally held that effective assistance of counsel on a defendant's first appeal as of right,

is guaranteed by 14th Amendment due process, with the result that a defendant whose appeal was dismissed because his attorney - like counsel at bar - duly filed a notice of appeal, but failed to timely take subsequent procedural steps, was granted federal habeas corpus, ordering his release unless the Commonwealth of Kentucky either reinstated his appeal or retried him. Similar results are reached where State procedural rules run afoul of basic rights encompassed within due process, such as the 6th Amendment right of confrontation, Davis v. Alaska, 415 U.S. 308, 39 L.Ed.2d 347 (1974), and the right to present a defense. Crane v. Kentucky, 476 U.S. 683, 690, 90 L.Ed.2d 636, 645 (1986); Chambers v.

Mississippi, 410 U.S. 284, 35 L.Ed.2d 297 (1973). This Court has **never** held that a fundamental constitutional right may be subjugated to a State procedural rule to the detriment of a defendant.

Clearly, even the Illinois reviewing courts, in the **criminal** appeal context, do not strictly apply the procedural rules - which results in the reinstatement of appeals "lost" due to technical defaults. See, e.g., People v. Moore, 133 Ill.2d 331, 549 N.E.2d 1257 (1990) (murder conviction appeal ordered reinstated 9 years after DWP order). Accord, each, reinstating appeal: People v. Mims, 82 Ill.2d 63, 411 N.E.2d 215 (1980); People v. Jacobs, 61 Ill.2d 590, 338 N.E.2d 161 (1975); People v. Aliwoli, 60 Ill.2d 579, 328

N.E.2d 555 (1975); People v. McManus, 66 Ill.App.3d 986, 384 N.E.2d 568 (3 Dist. 1978). See also People v. Scott, 143 Ill.App.3d 540, 493 N.E.2d 27 (1 Dist. 1986) (failure to file timely notice of appeal amounted to ineffective assistance under Post-Conviction Hearing Act, and required that filing of late notice of appeal be permitted); People v. Edgeworth, 30 Ill.App.3d 289, 332 N.E.2d 716, 718 (1 Dist. 1978) (reinstatement of appeal rather than post-conviction petition is the proper procedure).

However, because of the Appellate Court's misperception that the Illinois Supreme Court decision in Woodson, supra, controlled, here, the Court refused to reach the merits of

defendant's appeal in the instant case. This misperception resulted from the Appellate Court's refusal to properly characterize the instant case as being subject to criminal, rather than civil, governing principles. (App. 7-8)

THIS ORDINANCE VIOLATION CASE MUST BE TREATED AS A CRIMINAL CASE FOR PURPOSES OF DETERMINING WHETHER DISMISSAL OF THE APPEAL WAS CONSTITUTIONALLY PERMISSIBLE.

DEFENDANT WAS EXPOSED TO POTENTIAL RISK OF INCARCERATION - WHICH IS THE CONTROLLING FACTOR.

This Court has held that in determining whether to characterize an action (there, a juvenile proceeding charging a minor with commission of an offense) as civil or criminal, it is the potential risk of punishment to which the alleged violator is exposed, and not the label attached to the proceeding or the punishment in fact imposed, that

controls. Breed v. Jones, 421 U.S. 519, 44 L.Ed.2d 346, 357 (1975). Here, it is clear that defendant was exposed by the prosecution, to potential risk of incarceration and other forms of loss of liberty. (See Statement of the Case, pp. 6-7, supra.) A number of the ordinances for which defendant was prosecuted and convicted, carried possible penalties greater than "fine only," and indeed, defendant was in jeopardy of penalties of imprisonment up to 30 days and/or terms of public service. He was prosecuted and found guilty of 113 "multiple violations of the Municipal Code of Chicago." (C. 379) The prosecution of defendant **here**, included prosecution and conviction under Code sections providing for

possible jail terms. (See pp. 6-7, supra.) Code sec. 7-28-040 (Final Judgment Order at numbers 8 and 113), provides for a jail term of up to 30 days. (Def. Br. App. G, pp. 1, 7) Code sec. 7-28-060 (Final Judgment Order at number 40), provides for a jail term of up to 10 days. (Def. Br. App. G, p. 3)

Moreover, **all** of the municipal ordinance violations of which defendant was convicted here, carried also the possibility of a sentence of public service. Code sec. 1-4-120. (Def. Br. App. C; see also Def. Br. App. D).

"Public service" is defined by Illinois law in 730 ILCS 5/5-1-18.1:

> "'**Public or community service**' means uncompensated labor for a non-profit organization or public body whose sole purpose is to enhance physical or mental stability,

> environmental quality or the social welfare and which agrees to accept public or community service from offenders and to report on the progress of the public or community service to the court."

Public or community service is a discrete and separately-authorized sentencing disposition, defined above, and specified with detail at 730 ILCS 5/5-5-9. Failure to complete public or community service subjects an offender "to resentencing." 730 ILCS 5/5-5-9. Failure to complete public or community service can also subject an offender to punishment for contempt of court, notwithstanding other available alternatives. See, e.g., In re Baker, 71 Ill.2d 480, 376 N.E.2d 1005 (1978). Such contempt, if done in wilful disobedience, may be enforced or

punished with imprisonment. Chicago v. Drovers National Bank, Trustee, 36 Ill.App.3d 296, 343 N.E.2d 632 (1 Dist. 1976).

Thus, defendant, here, was **not** prosecuted and convicted under ordinances, the violation of which was punishable with a fine only. Accordingly, the Woodson case, "reluctantly" (App. 9) followed by the Appellate Court, should not even have been applied here. On the contrary, because this was **not** a civil case, the Appellate Court was not bound by Woodson and had discretion to reinstate the appeal at bar.

THE APPELLATE COURT HAD DISCRETION TO WAIVE THE PROCEDURAL REQUIREMENT, AND FAILURE TO DO SO VIOLATES DUE PROCESS

In any event, no matter what the

outward characterization or denomination of a cause, the only jurisdictional step in the perfection of any appeal in Illinois, be it civil or criminal, is the timely filing of the notice of appeal.[6] See People v. Jones, 104 Ill.2d 268, 472 N.E.2d 455 (1984) (filing of notice of appeal is the only jurisdictional step in perfecting an appeal). Thus, no matter how the cause

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[6] Ill.Sup.Ct.R. 301 (in the Civil Appeals Rules) provides, in part:

> "Every final judgment of a circuit court in a civil case is appealable as of right. The appeal is initiated by filing a notice of appeal. No other step is jurisdictional."

Ill.Sup.Ct.R. 606(a) (in the Criminal Appeals Rules), provides in part:

> "No step in the perfection of the appeal other than the filing of the notice of appeal is jurisdictional."

be characterized, the sole jurisdictional requirement was duly accomplished in this case. See Boone v. Evanston Hospital, 225 Ill.App.3d 195, 587 N.E.2d 1089, 1091 (1 Dist. 1992):

> "[B]ecause compliance with procedural rules is not jurisdictional, this court has the discretion to overlook 'procedural variations' which might warrant dismissal. The exercise of this discretion is necessary to avoid the harsh result of dismissal and to allow review on the merits." (Emphases added.)

What originally occurred here - the Appellate Court's vacation of its DWP order 12/16/93 upon consideration of defendant's well-pleaded reasons why the appeal should not be dismissed, adhered to on 2/18/94 when the Appellate Court denied the City's motion to vacate reinstatement of the appeal - was within

the Appellate Court's discretionary power to do substantial justice rather than to be bogged down in procedural technicalities that unfairly deprive a diligent litigant of his day in court. As we called to the Illinois Supreme Court's attention in the Petition for Leave to Appeal, in People v. Ballard, 59 Ill.2d 580, 322 N.E.2d 473, 475 (1975), the Court held the Appellate Court erred in dismissing an appeal from an ordinance violation, for failure of the defendant-appellant to serve the City with either notice of appeal or copy of defendant's Brief. In the course of its well-reasoned Opinion, id. at 474, the Court cited People ex rel. Pickerill v. New York Central R.R. Co., 391 Ill. 377, 383, 63 N.E.2d 405, 408

(1945), which stated: "'**Rules of procedure are not ends in themselves; they are designed to secure orderly and fair methods of disposing of litigated matters.**" 322 N.E.2d at 475. (Emphasis added.)

The Appellate Court's subsequent decision nonetheless to dismiss the instant appeal, thus in effect reversing itself (that is, reversing its prior order vacating the DWP order and reinstating the appeal), places form over substance and needlessly violates basic due process and fundamental fairness.

We submit that where, as here, defendant averred in the Appellate Court, facts which that Court properly found amounted to **good cause shown** to

vacate the DWP order and reinstate the appeal, then, even though defendant's motion to vacate was filed more than 21 days after the DWP order, the Appellate Court could properly reinstate the appeal where the motion to vacate was filed within 21 days of when counsel averred he was first notified of the DWP order. Holding otherwise violates due process.

LACK OF NOTICE. The essence of due process is notice and the opportunity to be heard. Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 94 L.Ed. 865, 873 (1950). There, this Court delineated the minimal constitutional standards of due process:

> "An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice

> reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections. . . . [citations omitted.] The notice must be of such nature as reasonably to convey the required information . . . ."

Accord, Davis v. Lane, 814 F.2d 397 (7 Cir. 1987). These requirements apply even where - as here - the penalty is a fine and not imprisonment, because the Constitution mandates that a person's **property** shall not be taken by the government without due process of law:

> "But *some* form of notice and hearing--formal or informal--is required before deprivation of a property interest that 'cannot be characterized as de minimus'." Fuentes v. Shevin, 407 U.S. 67, 90 n.21, 32 L.Ed.2d 556, 575 n.21 (1972). (Emphasis in original.)

Accord:

> "[D]ue process mandates some

> form of notice and hearing in order to deprive [a person of] a property interest that is more than de minimis." Stone v. Godbehere, 894 F.2d 1131, 1134 (9 Cir. 1990).

These decisions were rendered in the context of State action under the due process clause of the 14th Amendment to the United States Constitution.

Here, the lack of notice of entry of the DWP order, violated due process.

THE INSTANT CAUSE SHOULD BE TREATED AS A CRIMINAL APPEAL.

The Woodson case itself, supra, was a purely **civil** appeal (accident victim injured on school playground). This appeal is a **criminal** appeal. Defendant here was found "guilty of multiple violations of the Municipal Code of Chicago." One hundred and thirteen separate violations were entered under

the Code. (C. 379-405)

Fines totaling over 4 million dollars were imposed against defendant as punishment here. That the ordinances provide for fines makes clear this was a criminal prosecution. See, e.g., Grady v. Corbin, 495 U.S. 508, 109 L.Ed.2d 548 (1990); Robinson v. O'Neil, 409 U.S. 505, 35 L.Ed.2d 29 (1973); Waller v. Florida, 397 U.S. 387, 25 L.Ed.2d 435 (1970); accord, People v. Allison, 46 Ill.2d 147, 263 N.E.2d 80, 81 (1970); People v. Hoskinson, 201 Ill.App.3d 411, 559 N.E.2d 11, 13 (1 Dist. 1990).

Moreover, many of the ordinances of which he was convicted, provide for punishment even greater than a fine, as set out at pp. 6-7, supra. And, as already shown, **all** the violations

provided possible penalty of public service, all of which entail criminal attributes. (See pp. 23-25, supra.)

Like Woodson, all of the other decisions cited by the Appellate Court are significantly different from this case.[7]

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[7] Mitchell v. Fiat-Allis, Inc., (App. 9-10), 158 Ill.2d 143, 632 N.E.2d 1010 (1994) construed Supreme Court Rule 303(a)(1), applicable to civil cases.

The other cited cases, holding that municipal ordinance violations are reviewed as civil proceedings (App. 8), so hold **only** where the **sole possible penalty** is a fine. Chicago v. Prus, 117 Ill.App.3d 455, 453 N.E.2d 776, 785 (1 Dist. 1983) ("where, as here, the **sole penalty for violation of the ordinance is a fine** . . ."); Peoria v. Toft, 215 Ill.App.3d 440, 574 N.E.2d 1334, 1336 (3 Dist. 1991) (criminal procedure rules not applicable where parking ordinances provided for fines only); Beckmeyer v. Wheelan, 212 Ill.App.3d 287, 569 N.E.2d 1125 (5 Dist. 1991) (summary judgment procedure of Code of Civil Procedure applicable to fine-only ordinance violation situation); Elgin v. Hawthorne, 204 Ill.App.3d 807, 562 N.E.2d 670 (2 Dist. 1990) (affirmed due to insufficient record on appeal).

In none of the cited cases, was the ordinance violation punishable by any penalty other than a fine.

CONCERNS OF DUE PROCESS/FUNDAMENTAL FAIRNESS:

This Court should grant Certiorari in order to consider whether appeals in municipal ordinance violation cases that subject the defendant to the possibility of imprisonment, are governed by due process principles applicable to criminal, not civil, matters; and, whether, at bar, such principles of fundamental fairness and due process of law require that the merits of the instant appeal be reached.

Defendant here readopts the above Arguments why the instant cause should be treated as a criminal appeal. Criminal appeals are treated differently than civil appeals, and various constitutional guarantees are afforded the criminal appellant.

Because defendant was **not** prosecuted and convicted under ordinances, the violation of which was punishable with a fine only, the Appellate Court was not compelled to dismiss the appeal, but had discretion to reinstate it - considering the "good cause shown" as pointed out earlier in this Petition. (See pp. 9-11, 16-17, 29-30, supra.)

To the extent this Court may agree that pursuant to existing State law, the appeal had to be dismissed, then undersigned counsel's failure to petition for rehearing within 21 days of the initial DWP order must be construed as ineffective assistance of counsel that deprived defendant of his right to appeal. Accordingly, defendant should

be permitted to proceed with an untimely appeal in the interests of justice. Evitts v. Lucey, 469 U.S. 387, 83 L.Ed.2d 821 (1985) (defendant has a due process right to effective assistance of counsel on appeal).[8]

While reinstatement of the appeal can be sought via post-conviction proceedings, in the interests of

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[8] Accord: People v. Aliwoli, 60 Ill.2d 579, 328 N.E.2d 555 (1975) (where criminal appeal dismissed due to neglect of defendant's attorney, court abused discretion in refusing to reinstate appeal); People v. Scott, 143 Ill.App.3d 450, 493 N.E.2d 27 (1 Dist. 1986) (failure of appellate counsel to file timely notice of appeal, thereby precluding defendant's appeal as of right, amounted to ineffective assistance of counsel, requiring that filing of late notice of appeal be permitted); People v. Moore, 133 Ill.2d 331, 549 N.E.2d 1257 (1990) (reinstatement of appeal appropriate where appeal dismissed through no fault of appellant, but due to counsel's failure to follow appellate rules).

judicial economy, we seek relief via the instant proceeding.

(Parenthetically, this appeal involves the propriety of an order, obtained below by the City of Chicago, **barring** defendant from presenting and litigating a 4th Amendment motion and **barring** defendant from defending himself at his trial - for defendant's refusal to consent to an "inspection" of the interior of his premises. See p. 7, supra. It would be ironic, indeed, to bar defendant from appealing this gross injustice.)

Note finally, that the 5th Amendment proscription against double jeopardy - part of 14th Amendment due process of law - applies even where an ordinance is punishable "only by a

fine." People v. Allison, 46 Ill.2d 147, 263 N.E.2d 80, 81 (1970), interpreting and applying Waller v. Florida, 397 U.S. 387, 25 L.Ed.2d 435 (1970). The 6th Amendment guarantee of effective assistance of counsel on appeal - also part of 14th Amendment due process - likewise applies. Evitts v. Lucey, supra.

In any event, the ordinances at bar clearly were **not** punishable "only by a fine." Accordingly, pursuant to due process and fundamental fairness, the Appellate Court had discretionary power to reinstate this appeal. Its failure to do so violates due process, and should be scrutinized by this Court.

GUIDANCE FROM HABEAS PRACTICE

Although habeas corpus proceedings

are deemed "civil," and tentatively are regulated by civil procedure, this Court has held that strict civil procedural rules may not be applied in habeas proceedings so as to deny substantial justice. See, e.g., Hilton v. Braunskil, 481 U.S. 770, 95 L.Ed.2d 724 (1987). Cf. McCleskey v. Zant, 499 U.S. 467, 113 L.Ed.2d 517 (1991); Schlup v. Delo, 513 U.S. ___, 130 L.Ed.2d 808, 831 (1995); Kuhlmann v. Wilson, 477 U.S. 436, 91 L.Ed.2d 364 (1986).

See Karstetter v. Cardwell, 399 F.Supp. 1298 (S.D.N.Y. 1975) (late filing of notice of appeal allowed on finding of "excusable neglect"). There, a State prisoner's time for filing Notice of Appeal from denial of habeas corpus had elapsed due to counsel's

erroneous calculation; he asserted the bulk of his practice involved cases wherein the United States is a party, and therefore calendared the case as one with a 60-day period for filing notice of appeal, rather than the actually applicable 30-day period. The Court concluded that for purposes of filing a tardy notice of appeal, although a petition for writ of habeas corpus is a civil, as opposed to a criminal, proceeding, the standard of "excusability" utilized in criminal, rather than in civil cases must apply, because "a man's liberty is at stake." Accord, Inglese v. Warden, 687 F.2d 362 (11 Cir. 1982).

Here, too, because of the exposure of defendant to the potential punishment

of imprisonment and other infringements on his liberty, a man's liberty was at stake. Accordingly, the cause must be treated as criminal, rather than civil, for present purposes.

CONCLUSION

For any and all of the foregoing reasons, certiorari should be allowed; and, on the merits, defendant's appeal should be reinstated, and the cause remanded with instructions that the Appellate Court decide the merits of defendant's appeal.

Respectfully submitted,

FREDERICK F. COHN
Attorney for Petitioner

DENNIS DOHERTY, *of counsel*

APPENDICES

APPENDIX A

THIRD DIVISION
February 15, 1995

NOTICE

The text of this opinion may be changed or corrected prior to the time for filing of a Petition for Rehearing or the disposition of the same.

No. 1-92-4474

CITY OF CHICAGO, A Municipal Corporation,	)	Appeal from Circuit Court of Cook County
Plaintiff-Appellee,	)	
v.	)	
THADDEUS PUDLO and WALTER PUDLO, d/b/a Pudlo Food Products,	)	Honorable Paul Preston, Judge Presiding.
Defendant-Appellants.	)	

PRESIDING JUDGE GREIMAN delivered the opinion of the court:

Defendant, Thaddeus Pudlo, (Pudlo) appeals from a judgment entered against him in the enforcement of municipal

ordinances and the imposition of fines as authorized by the Municipal Code of Chicago. Chicago Municipal Code, ch. 4-8, sec. 850; ch. 4-9. sec. 370. (1983, amended).

On appeal defendant contends (1) that the circuit court lacked jurisdiction because of a prior dismissal; (2) sanctions were imposed against him in violation of his fourth amendment rights; and (3) the sanctions imposed were unduly excessive and an abuse of discretion.

During the pendency of this appeal, the matter was dismissed for want of prosecution and 63 days later defendant filed a motion to vacate the order of dismissal which was granted.

The city now alleges Pudlo's

failure to comply with the procedural requirements of Supreme Court Rule 367(a) (134 Ill. 2d R. 367(a)), which required defendant to file a petition to vacate the order of dismissal within 21 days after the entry of the judgment, resulted in this court's loss of its appellate jurisdiction.

We agree that this court was without jurisdiction to vacate the dismissal order, and we dismiss Pudlo's appeal. As a consequence, this opinion is limited to examination of the jurisdictional question, leaving the circuit court's judgment and other rulings undisturbed.

In 1990 the City of Chicago filed three separate complaints against Thaddeus Pudlo, doing business as Pudlo

Food Products, alleging numerous violations of the city's Municipal Code relating to real property owned and operated by Pudlo within the City of Chicago. The complaints were consolidated in the action below.

During the pendency of that litigation, Pudlo was held in contempt of court, and later sanctioned under Supreme Court Rule 219(c), for his willful and repeated refusal to allow inspection of the Pudlo property pursuant to both the city's request for discovery and direct court orders. The circuit court entered a final judgment on November 17, 1992, imposing fines on Pudlo for 113 code violations.

Pudlo filed his notice of appeal on December 15, 1992. On September 30,

1993, this court dismissed the appeal for want of prosecution. Pudlo moved to vacate the dismissal and reinstate the appeal on December 2, 1993, which motion was granted by this court on December 16, 1993.

The city contends the fact Pudlo moved to vacate this court's dismissal on December 2, 1993, exceeding the time allotted under Rule 367(a) by 41 days, deprived this court of jurisdiction to reinstate Pudlo's appeal, and accordingly, this court's dismissal on September 30, 1992 *[sic.*[1]*]*, was final.

Supreme Court Rule 367(a) requires that a petition for rehearing "be filed within 21 days after the filing of the

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[1] *Footnote, added by Petitioner's counsel.* "1992" is obviously a typographical error; "1993" is intended.

judgment, unless on motion the time is shortened or enlarged by the court or a judge thereof." 134 Ill. 2d R. 367(a).

In Woodson v. Chicago Board of Education (1993), 154 Ill.2d 391, 609 N.E.2d 318, our Supreme Court held that "[w]hen the appeal of the [circuit court's] order was dismissed for want of prosecution . . . and a petition for rehearing was not filed within 21 days, the dismissal order became final and the appellate court lost jurisdiction to consider additional arguments stemming from the order." (Woodson, 154 Ill.2d at 397.) This court did not have before it a motion to extend the time for filing beyond the 21 days required by Rule 367. Thus, after the passage of the 21 day period, we lacked discretion to vacate

its dismissal for want of prosecution, being without jurisdiction to entertain action.

Pudlo attempts to distinguish the instant case from Woodson, arguing that the principles of Woodson apply only to civil cases, and that the ordinance violations were criminal in nature, exposing him to both fines and a 30 day jail sentence. Pudlo's reliance on this distinction is misplaced. Nothing in Woodson expressly limits its holding to civil cases generally, or "fine only" ordinance prosecutions in particular, although such might be an appropriate limitation. However, prosecutions for municipal ordinance violations are civil in nature, and are tried and reviewed as civil proceedings.

Beckmeyer v. Wheelan (1991), 212 Ill. App. 3d 287, 569 N.E.2d 1125; Peoria v. Toft (1991), 215 Ill. App. 3d 440, 574 N.E.2d 1334; Elgin v. Hawthorne (1990), 204 Ill. App. 3d 807, 562 N.E.2d 670; Chicago v. Prus (1983), 117 Ill. App. 3d 455, 453 N.E.2d 776.

Nothing before this court suggests that an exception be created determining Rule 367 inapplicable to municipal ordinance proceedings. To the contrary, even the authority cited by Pudlo expressly supports the proposition that prosecutions for municipal ordinance violations, though quasi-criminal in nature, are to be tried and reviewed as civil actions. Chicago v. Prus, 117 Ill. App. 3d at 467.

The holding in Woodson is clear,

and given the similarity between Woodson and the instant case, each involving the identical procedural sequence, this court must accept, reluctantly, Woodson's unequivocal and controlling language.

Our hesitancy is due to our recognition of future controversies where such a formalistic application of Rule 367 might lead to dismissals contrary to principles of fairness and the interests of justice. However, this is not such a case.

Accordingly, since this court is without the authority to excuse compliance with the filing requirements of the supreme court rules governing appeals, (Mitchell v. Fiat-Allis, Inc. (1994), 158 Ill. 2d 143, 632 N.E.2d

1010), this appeal is dismissed for lack of jurisdiction pursuant to Supreme Court Rule 367(a). 134 Ill. 2d R. 367(a).

Appeal dismissed.

TULLY, J., and CERDA, J., concur.

APPENDIX B

78682

ILLINOIS SUPREME COURT
JULEANN HORNYAK, CLERK
SUPREME COURT BUILDING
SPRINGFIELD, ILL. 62706
(217) 782-2035

June 1, 1995

Mr. Dennis Doherty
Attorney at Law
205 W. Wacker Dr., S#1515
Chicago, IL 60606

No. 78682 - City of Chicago, etc., respondent, v. Thaddeus Pudlo, petitioner. Leave to appeal, Appellate Court, First District.

The Supreme Court today DENIED the petition for leave to appeal in the above entitled cause.

The mandate of this Court will issue to the Appellate Court on June 23, 1995.

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